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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN HOWARD HARDACRE,

Defendant and Appellant.

2d Crim. No. B164029
(Super. Ct. No. F318667)
(San Luis Obispo County)

Appellant John Howard Hardacre was convicted of assaultive offenses against personnel at Atascadero State Hospital (ASH), where he was involuntarily committed, and was sentenced to prison for 25 years to life under the Three Strikes law. He contends: (1) the court admitted prejudicial evidence about the serious felony convictions leading to his civil commitment; (2) one of the counts must be reversed as a lesser included offense of another; (3) the evidence was insufficient to prove he acted with the intent necessary to support one of his convictions; (4) the jury was not fully instructed on the extent of a patient's rights while in a locked facility; (5) the court abused its discretion in denying his motion to either reduce his felony count to a misdemeanor or strike his prior convictions for sentencing purposes. We agree the court admitted

prejudicial evidence that he had prior convictions for serious felonies, and that simple assault is a lesser included offense of battery with serious bodily injury. We reverse.

BACKGROUND

Appellant was involuntarily committed to ASH as a sexually violent predator (SVP). (See Welf. & Inst. Code, § 6600 et seq.) He was housed in a dormitory room with several other patients. The patients in his unit were entitled to a certain amount of locker space for storing personal property in their dormitory rooms. Excess property had to be kept in a separate property room.

Hospital regulations governed the type of property that patients could possess. Appellant had a large stamp collection which did not fit in his assigned dormitory room locker space. ASH personnel had asked appellant to reduce the volume of this collection or have it moved to the property room. Although collectible stamps were not specifically prohibited as items of personal property, the staff maintained that the volume of appellant's collection posed a fire hazard and interfered with their ability to efficiently conduct periodic random searches for contraband.

On October 18, 2001, psychiatric nurse Jeanette Rouse was instructed by her supervisor to confiscate appellant's stamp collection and move it to the property room. She and a psychiatric technician entered the dormitory room for this purpose and found appellant alone. Appellant challenged Rouse's right to remove the stamps and asked for authorization. After a lengthy and somewhat heated conversation, appellant sat down in a chair and put his feet up on his bed to block Rouse's access to his locker.

Nurse Randy Blackwell and ASH police officer Scott Timko were among those who responded to the psychiatric technician's request for additional assistance. Timko told appellant to comply with Rouse's directives, but he refused to do so. When Rouse reached for appellant's arm, he made a fist and started to swing. Blackwell grabbed appellant's arm to prevent him from striking Rouse and a struggle ensued to remove appellant from the chair and from the dormitory room. During the struggle, appellant bit Blackwell on the arm. The chair in which he was sitting moved across the

room and pinioned Rouse between the back of the chair and a bed, fracturing her fibula and bruising her calf. According to Rouse, Blackwell and other ASH personnel who were present, the chair moved because appellant was propelling it with his feet. Rouse called out that her leg was trapped, but appellant kept pushing.

During the trial, the defense called as witnesses two patients who had observed a portion of the altercation. Richard Connelly testified that he did not see appellant make a fist or propel his chair across the room. Rather, Blackwell had pushed the chair across the room while trying to remove appellant from the chair. Sam Allen testified that he saw Blackwell grab appellant by his head and neck and place his hand over his mouth. According to Allen, the chair in which appellant was sitting was dragged across the room during Blackwell's efforts to remove appellant.

Appellant was charged with four felony counts as a result of this altercation: assault with a deadly weapon and by means of force likely to produce great bodily injury against Jeanette Rouse (count 1), battery with serious bodily injury against Rouse (count 2), assault by means of force likely to produce great bodily injury against Randy Blackwell (count 3), and resisting an executive officer, Scott Timko, in the performance of his duties (count 4). (Pen. Code, §§ 245, subd. (a)(1), 243, subd. (d), 69.) The amended information alleged that appellant had personally inflicted great bodily injury in the commission of counts 1 and 3, had personally used a dangerous or deadly weapon in the commission of count 2, and had been previously convicted of three qualifying felonies under the Three Strikes law. (Pen. Code, §§ 12022.7, subd. (a), 12022, subd. (b)(1), 1170.12.)

The jury convicted appellant of battery with serious bodily injury as charged in count 2, but rejected the weapon use allegation. It acquitted him of the remaining felony counts and convicted him instead of misdemeanor lesser included offenses: simple assault under counts 1 and 3 (Pen. Code, § 240) and resisting a peace officer under count 4 (Pen. Code, § 148). The court found the Three Strikes allegations true in a bifurcated proceeding and sentenced appellant to prison for a term of 25 years to

life for the felony battery in count 2. It imposed concurrent six-month terms as to each of the misdemeanors in the remaining counts.

DISCUSSION

Evidence of Prior Serious Felonies

Appellant made a pretrial motion to exclude evidence that he had been committed to ASH as an SVP. The court agreed that the reference to appellant's SVP status would be unduly prejudicial under Evidence Code section 352,¹ but allowed the prosecution and its witnesses to state that appellant was a patient at ASH under a civil commitment for having prior serious felony convictions.

Appellant contends the court's efforts to sanitize the nature of his civil commitment were not effective, and argues that the reference to his prior crimes as serious felonies was more prejudicial than probative under Evidence Code section 352. We conclude that the jury should not have been advised of his prior serious felony convictions but do not rely on Evidence Code section 352. Because the evidence had no probative value, the balancing process of Evidence Code section 352 was unnecessary. (See *People v. Ewoldt* (1994) 7 Cal.4th 380 404.)

Evidence that appellant was a serious felony offender was irrelevant and constituted inadmissible character evidence. Although it has exceptions, the Evidence Code section 1101, subdivision (a)² rule excluding evidence of a defendant's character to prove conduct on a specific occasion has particular importance when the evidence concerns prior criminal acts. (See *People v. Ewoldt, supra*, 7 Cal.4th at p. 404.) There is

¹ Evidence Code section 352 provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

² Evidence Code section 1101, subdivision (a) provides that, "[e]xcept as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

a grave danger of prejudice from the admission of evidence of prior convictions when the question of defendant's guilt remains at issue. (*Ibid.*; see also *People v. Calderon* (1994) 9 Cal.4th 69, 79.)

The People claim that the evidence presented was necessary to explain why appellant was housed at ASH under such restrictive conditions and why the staff was so insistent about confiscating his stamp collection. We agree that it would be reasonable to disclose to the jury that appellant was lawfully confined at ASH and that the facility had security regulations regarding the confiscation of his stamp collection, but such disclosure easily could have been accomplished without revealing that appellant's commitment was based on multiple serious felony convictions. The underlying reason for appellant's commitment shed no light on his conduct or that of ASH personnel during the incident leading to the charged offenses.

Concluding that the trial court erred in admitting the evidence, however, does not end our analysis. The erroneous admission of prior crimes evidence requires reversal of the judgment only if it is reasonably probable the defendant would have obtained a more favorable outcome absent the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Harris* (1998) 60 Cal.App.4th 727, 741.) In this case, considering the tendency that prior conviction evidence will evoke an emotional bias, there is a reasonable probability that the jury considered appellant's past offenses in reaching its verdict and that, without the past offense evidence, the jury would have reached a verdict more favorable to appellant. (*Ibid.*)

The disclosure was not merely that appellant had been committed to ASH due to criminal convictions. The jury was informed that appellant had *multiple* convictions for *serious* felonies. The trial court informed the jury that appellant was a serious felony offender at the commencement of trial, the prosecutor repeated the information in his opening statement, and a witness testified to the fact. The seriousness, as well as the existence, of appellant's criminal history provided a constant drumbeat during trial. Implicit in the description of appellant is that he is a violent criminal and a

recidivist. It is likely that the jury, faced with knowledge that appellant had committed multiple prior serious offenses, concluded that he had a disposition to and probably committed the charged offenses. (See *People v. Thompson* (1988) 45 Cal.3d 86, 109.)

In addition, although the evidence was sufficient to support the convictions when viewed in the light most favorable to the judgment, we consider conflicting evidence to determine whether improperly admitted evidence was prejudicial. (See, e.g., *People v. Cenicerros* (1994) 26 Cal.App.4th 266, 281.) Appellant offered testimony that he was the victim, not the aggressor. Two percipient witnesses, whose testimony shows that they saw the events that most directly led to Nurse Rouse's injuries, testified that an ASH nurse pushed or dragged appellant's chair across the room during the altercation. In addition, there was evidence that appellant had not been violent previously but that some of the ASH employees involved in the incident had been abusive to other patients.

The verdicts reflect the importance of this evidence to the jury. The jury found appellant guilty of a lesser included offense on three of the four counts, suggesting that it was concerned about the evidence and seriousness of appellant's criminal conduct.

As respondent notes, the trial court instructed the jury that appellant's prior convictions could not be considered as evidence that he had committed the charged offenses. We presume jurors follow this instruction (*People v. Williams* (2000) 79 Cal.App.4th 1157, 1171), but limiting instructions are not panaceas that always eliminate the risk of prejudice. (*People v. Antick* (1975) 15 Cal.3d 79, 98, disapproved on other grounds in *People v. McCoy* (2001) 25 Cal.4th 1111, 1123.) ""It seems too plain for argument that to place before a jury the charge in an indictment, and to offer evidence on trial as a part of the state's case that the defendant has previously been convicted of one or more offenses is to run a great risk of creating a prejudice in the minds of the jury that no instruction of the court can wholly erase, and, while appellate courts will presume that the jury has followed the instructions of the court, yet we cannot blind our eyes to the active danger ever lurking in such action."" (*People v. Bracamonte* (1981) 119

Cal.App.3d 644, 650-651, quoting *State v. Kirkpatrick* (1935) 181 Wash. 313 [43 P.2d 44, 45].)

Although we reverse because the court erred in instructing the jury that appellant was a serious felony offender, we address other issues raised by appellant to assist the court in the retrial, if any.

Denial of Special Instructions on Right to Privacy

And Defense of Habitation

At defense counsel's request, the trial court gave a special jury instruction stating, "Persons with mental disorders have the same legal rights and responsibilities guaranteed all other persons by the federal Constitution and laws, and the Constitution and laws of the State of California, unless specifically limited by federal law or regulations." It refused to include additional language that would have advised the jury, "Among these [rights] is the right to privacy." The court also rejected a modified version of CALJIC No. 5.40, which would have advised the jury, "The lawful occupant of a habitation . . . has the right to request a trespasser or unauthorized intruder to leave the premises. If the trespasser does not do so within a reasonable time, the occupant may use reasonable force to eject the trespasser. . . . [¶] . . . Although a patient in a locked psychiatric hospital has an expectation that staff will enter his room for purposes related to treatment, he retains the right to be free from unauthorized intrusions by staff."

Appellant argues that the proposed instructions should have been given in their entirety and that their omission was prejudicial because "[t]he propriety of staff actions was critical in assessing the context of appellant's actions." The instructions would have allowed the defense to argue the theory that appellant had the right to ask Rouse and the others to leave and to physically resist their efforts to remove his stamp collection so long as he was entitled to possess it under existing law and the rules of the institution.

The court did not err in refusing the instructions because they would have misstated the degree of appellant's personal autonomy in ASH. While we have no quarrel

with the notion that SVP patients retain rights not inconsistent with their treatment programs or institutional security, SVPs simply do not enjoy as broad a right to privacy as do persons not subject to involuntary civil commitments.³ Appellant cites no authority for the proposition that he was entitled to forcibly resist an intrusion upon his right to privacy or his right to possess personal property. He does not claim that a violation of these rights by ASH personnel would have itself negated any element of the charged offenses or provided an affirmative defense.

The authorities on which appellant relies in support of his requested instructions are all inapposite. *People v. Fond* (1999) 71 Cal.App.4th 127, considered whether a private room at a locked residential psychiatric hospital was an inhabited dwelling house for purposes of first degree burglary. The defendant in that case was a patient who had entered the room of another patient and raped her; the court concluded the room qualified as an inhabited dwelling house, noting in dicta that while the victim would have expected hospital staff to enter the room for treatment, "there is no evidence she expected that the staff could use her room for their own purposes no matter how unrelated to the operation of the hospital." (*Id.*, at p. 131.) *In re Qawi* (2004) 32 Cal.4th 1, and *Reise v. St. Mary's Hospital & Medical Center* (1987) 209 Cal.App.3d 1303, concerned the right of patients involuntarily committed under the Lanterman-Petris-Short Act, or under a commitment scheme incorporating the protections under that act, to refuse psychotropic medication. *Keyhea v. Rushen* (1986) 178 Cal.App.3d 526, concerned the right of state prisoners to refuse psychotropic medication. None of these cases supports the instructions requested by appellant.

³ The California Code of Regulations currently provides that mental health patients committed under an involuntary treatment program other than the Lanterman-Petris-Short Act have an unconditional right to "privacy, dignity, respect and humane care" (Cal. Code Regs., tit. 9, § 883, subd. (b)(1)) and narrowly defines "privacy" as "being free from observation by individuals of the opposite sex during medical examinations, personal care, bathing and restroom use, except during emergencies and necessary supervision by staff" (Cal. Code Regs., tit. 9, § 881, subd. (u)). These regulations did not go into effect until July 4, 2003, after appellant committed the offenses in this case.

The jury in this case heard considerable evidence about the internal regulations at ASH and a patient's right to keep personal belongings. The defense was free to argue that the removal of appellant's stamp collection did not comport with these regulations.⁴ But common sense tells us that a locked facility such as ASH could not function if patients had the legal right to refuse contact with its personnel and to physically resist efforts to remove property that the facility believed to be unauthorized. Appellant was not entitled to instructions that he was entitled to exclude hospital personnel from his room or use force against them to prevent the removal of his property. His remedy for a violation of his rights, if any, was to pursue administrative relief through the hospital and, if appropriate, to seek relief in the courts.

Conviction of Simple Assault on Count 1

Appellant's conviction of simple assault as a lesser included offense of the aggravated assault charged in count 1 was based on his act of pinioning Jeanette Rouse between his chair and the bed, thus fracturing her leg. The same conduct was the basis for his conviction of battery with serious bodily injury in count 2. Appellant contends, the People concede, and we agree that count 1 is a lesser included offense of count 2, and multiple convictions may not be based on necessarily included offenses. (*People v. Ortega* (1998) 19 Cal.4th 686, 692.)

⁴ The jury was fully instructed on the principles of self-defense, and was given a special instruction stating, "Staff at a psychiatric hospital may not initiate a restraint or containment procedure on a patient unless prior to the initiation of the procedure, it is established that there is no less restrictive alternative to protect the patient or others from injury."

The remaining issues on appeal pertain to sufficiency of evidence to support a conviction and the exercise of sentencing choices following conviction. Since we reverse, we need not address those contentions.

The judgment is reversed.

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PERREN, J.

I concur:

GILBERT, P.J.

COFFEE, J. -- Dissenting

I respectfully dissent.

I agree with the majority's conclusion that the jury should not have been advised of appellant's prior serious felony convictions. Due to the substantial prejudice inherent in such evidence, prior crimes are admissible over an Evidence Code section 352 objection only if they have *substantial* probative value. (See *People v. Ewoldt* (1994) 7 Cal.4th 380 404.) The prior convictions in this case lacked any such value. Although the prosecution had some interest in establishing that appellant was lawfully confined at ASH and that the facility had security concerns supporting the confiscation of his stamp collection, this end could have been accomplished without revealing that appellant's commitment was based on serious felony convictions.

That said, I do not agree the error was prejudicial. The erroneous admission of prior crimes evidence requires reversal of the judgment only if it is reasonably probable the defendant would have obtained a more favorable outcome absent the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Harris* (1998) 60 Cal.App.4th 727, 741.) In this case, there was no reasonable probability.

First, the evidence of guilt was overwhelming. (See *People v. Gurule* (2003) 28 Cal.4th 557, 609.) The nurses and officers involved in subduing appellant all testified that he refused to follow their directions, struggled with them, bit Nurse Blackwell in the arm and purposefully maneuvered the chair in which he was sitting against Nurse Rouse's leg, even as she called out that her leg was being pinned. Rouse's leg was broken as a result. Two patients who witnessed the struggle from the hallway testified that the chair moved across the room because Blackwell was trying to remove appellant from the chair, suggesting something less than a willful application of force against Rouse's leg. But these patients arguably did not see the entire altercation, and their testimony was impeached by their own serious felony convictions.

Second, the court gave a limiting instruction drafted by defense counsel, which stated that the prior convictions could not be considered as evidence of appellant's

guilt. We presume the jurors followed this instruction absent some evidence to the contrary. (*People v. Williams* (2000) 79 Cal.App.4th 1157, 1171.)

Third, the jurors found appellant guilty of only the lesser included offense on three of the four counts. The majority sees this as an indication that the case was close and the verdict was likely to be influenced by the evidence of the prior convictions. I construe the verdicts on the lesser crimes to mean that the jurors carefully considered the various counts and did not simply convict appellant because of his criminal history. (See *People v. Singh* (1995) 37 Cal.App.4th 1343, 1375.)

I would affirm the judgment.

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COFFEE, J.

Michael L. Duffy, Judge
Superior Court County of San Luis Obispo

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